

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAJUNA D. DICKINSON,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 208830

Recorder's Court

LC No. 96-005248

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAJUNA D. DICKINSON,

Defendant-Appellant.

No. 208831

Recorder's Court

LC No. 96-006636

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

In docket no. 208830, defendant was convicted after a jury trial of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and sentenced to two and one-half to five years' imprisonment. In docket no. 208831, defendant was found guilty of violating his probation and was sentenced for his underlying conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), to seven and one-half to twenty years' imprisonment. In each case, defendant appeals as of right. The appeals have been consolidated for this Court's consideration. We affirm.

In Docket No. 208830, we conclude with respect to defendant's first contention of error that the trial court did not abuse its discretion in admitting into evidence two .357 revolvers. *People v*

Starr, 457 Mich 490, 494; 577 NW2d 673 (1998). The complainants testified that they observed defendant possess a .357 revolver, and that the revolvers admitted into evidence appeared similar to that defendant possessed during the crime. The two .357 revolvers received into evidence constituted relevant evidence under MRE 401. Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403, given that the weapons were similar to, and of the same kind as, the weapon that defendant was observed possessing when the charged assaults were committed. *People v Hall*, 433 Mich 573, 579-585; 447 NW2d 580 (1989); *People v Kelly*, 386 Mich 330, 337-338; 192 NW2d 494 (1971).

Next, defendant claims that in both docket numbers 208830 and 208831 the trial court relied on improper criteria when sentencing him. Although a trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding, *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996), we are satisfied that the trial court did not improperly make an independent finding of guilt with respect to the original assault with intent to commit murder charges, notwithstanding the fact that the jury found defendant guilty only of carrying a concealed weapon. A court may consider evidence admitted at trial as an aggravating factor in determining an appropriate sentence. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995); *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). The record reflects that, as in *Shavers*, the trial court did not improperly find that defendant was actually guilty of assault with intent to commit murder. Rather, the court made permissible inferences from the evidence submitted at trial, which reflected conduct more serious than mere possession of a concealed weapon, and considered that evidence as an aggravating factor in determining an appropriate sentence.

Second, we find that the trial court's criticism of perceived executive branch policies and influence reflected in the probation department's sentence recommendations did not affect the validity of defendant's sentence, in light of the trial court's explanation that it was rejecting the probation department's recommendation on the basis of the specific facts surrounding the offenses in question and defendant's criminal history. Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). Considering the violent and dangerous nature of defendant's conduct and defendant's other criminal behaviors, a departure from the sentencing guidelines' recommendation was warranted, and defendant's CCW sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

With respect to the sentence imposed for defendant's probation violation, defendant correctly observes that the sentencing guidelines do not apply to defendants convicted of probation violations. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992); *People v Smith*, 195 Mich App 147, 149-150; 489 NW2d 135 (1992). In light of the nature of defendant's conduct and defendant's criminal background, we likewise find proportionate his probation violation sentence. *Milbourn, supra*.

Finally, limiting our review to the existing record, we conclude that defendant has failed to demonstrate that he was denied the effective assistance of counsel. *Strickland v Washington*, 466 US

668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Sharbnaw*, 174 Mich App 94, 106; 435 NW2d 772 (1989). First, contrary to defendant's assertions, trial counsel did object to the introduction of the .357 revolvers into evidence, and thus was not deficient in that regard. Furthermore, as we have already concluded, the trial court properly admitted the two weapons into evidence.¹ Second, even though trial counsel failed to object to the trial court's remarks at sentencing, for the reasons previously discussed we find that the remarks were not improper and do not affect the validity of defendant's sentence. Thus, trial counsel did not render ineffective assistance in failing to object to these statements.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

¹ To the extent defendant challenges his trial counsel's failure to object to the admission of photographs of a bullet proof vest, we likewise conclude that the trial court properly admitted this evidence. Several witnesses testified at trial that at the time of the shooting defendant wore a bullet proof vest or something resembling a back brace. The fact that the police recovered a bullet proof vest from defendant's mother, a Detroit police officer, is relevant to show defendant's involvement in the crime. MRE 401. Because the admission of photographs of the vest did not substantially and unfairly prejudice defendant, MRE 403, the trial court properly acted within its discretion in admitting the photographs, and trial counsel therefore was not ineffective in failing to object to their admission. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).